

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT JAYNE BOYD, JR.,

Defendant-Appellant.

---

UNPUBLISHED

May 30, 1997

No. 185606

Kalamazoo Circuit Court

LC No. 93-000576-FH

Before: Hoekstra, P.J., and Markey and J.C. Kingsley\*, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of involuntary manslaughter, MCL 750.321; MSA 28.553, in the death of his 2-1/2-year-old stepson. Defendant subsequently pleaded guilty to being a third habitual felony offender, MCL 769.11; MSA 28.1083, and was sentenced to twenty to thirty years' imprisonment. We affirm.

Defendant first argues that his right to be free from double jeopardy was violated when he was retried for the same crime following a sua sponte declaration of a mistrial that was pursued without his consent, and for which there was no manifest necessity. We disagree.

Defendant's first trial on the charge of involuntary manslaughter ended when the trial judge declared a mistrial and discharged the jury during the prosecution's case-in-chief, after having been made aware of the fact that a key prosecution witness had perjured himself. The witness in question initially testified before the jury that he had overheard defendant state, while speaking of the victim's death in the present case, "I didn't mean to hit him that hard." A few days later, while outside the presence of the jury, that same witness recanted his testimony, claiming that he had been pressured and threatened by both the police and the prosecutor to testify against defendant. That same evening, the trial judge then received a letter from the witness, wherein he indicated that he had lied when he recanted his testimony earlier that afternoon, vowed that he had indeed heard defendant make that statement, and explained that he had been receiving death threats from defendant. Because of the

---

\* Circuit judge, sitting on the Court of Appeals by assignment.

witness's vacillating testimony, the trial court raised the issue of declaring a mistrial, and neither the prosecutor nor defense counsel objected. The trial court, convinced that the "ends of justice" would be defeated by allowing a known perjurer to testify, then determined that a fair trial could not be had for either party and declared a mistrial.

If the trial court declares a mistrial after jeopardy has attached, as in the present case, the state is precluded from bringing the defendant to trial a second time unless the defendant consented to the mistrial *or* the mistrial was of manifest necessity. *People v Hicks*, 447 Mich 819, 828, 830; 528 NW2d 136 (1994). Here, we need not reach the issue of whether manifest necessity existed because we find, based upon our review of the record, that defendant consented to the mistrial.

Defendant argues that he did not consent to the mistrial, claiming that he instead only deferred to the discretion of the court on the matter.<sup>1</sup> Here, we view defendant's act of not taking a position in opposition to the mistrial or deferring to the trial court's discretion to be tantamount to consenting to whatever course of action the court then follows. To allow defendant to now claim that his actions did not evidence his consent to a mistrial would be to allow defendant to have his cake and eat it too, as he would be just as able to argue that he did consent if that were more advantageous to him. See *People v Tracey*, 221 Mich App 321, 327, n 3; 561 NW2d 133 (1997). Therefore, because defendant consented to the mistrial, his later retrial did not violate his right to be free from double jeopardy.

Defendant next argues that the trial court abused its discretion in allowing the admission into evidence of nine autopsy photographs depicting the victim's internal injuries in both the abdominal and head areas. We disagree. The decision to admit or exclude photographs is within the sole discretion of the trial court, the proper inquiry being whether the probative value of the photographs is substantially outweighed by unfair prejudice. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, modified on other grds, 450 Mich 1212; 539 NW2d 504 (1995). Here, the photographs at issue provided the basis for the medical experts' testimony and were used to refute the defendant's theory of the case as well as to establish cause of death. We find no abuse of discretion by the trial court in admitting these photographs, because their probative force was not substantially outweighed by the danger of unfair prejudice. *Id.* at 78.

Third, defendant argues that he was denied a fair trial because the trial court abused its discretion in allowing the prosecution to admit evidence of "other bad acts" in order to establish that defendant was abusive toward the victim. Defendant contends that such evidence was not admissible under MRE 404(b). Again, we disagree. This Court reviews a trial court's ruling regarding the admission of evidence pursuant to MRE 404(b) under an abuse of discretion standard. *People v McMillan*, 213 Mich App 134, 137; 539 NW2d 553 (1995). MRE 404(b) is an inclusionary rather than an exclusionary rule. *People v VanderVliet*, 444 Mich 52, 64-65; 508 NW2d 114 (1993); amended 445 Mich 1205; 520 NW2d 338 (1994). To be admissible under MRE 404(b) the evidence must be offered for a proper purpose under the rule; it must be relevant under MRE 402; the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403; and the trial court may, upon request, provide a limiting instruction to the jury. *Id.* at 74-75.

Here, we find that the testimony in question concerning the relationship between defendant and the victim was probative regarding scheme, plan or system, and absence of mistake or accident, and was relevant, particularly in light of defendant's claim that the victim died of accidental injuries. Regarding whether the prejudicial effect outweighed the probative value of the evidence, we note that the trial court never addressed this issue. Nevertheless, we find no abuse of discretion because the negative implication of the testimony was cumulative to the testimony of other witnesses who testified that the victim was terrified of and intimidated by defendant, and that defendant did, at times, physically discipline the victim. Finally, the trial court carefully instructed the jury with respect to the proper purpose of the testimony in determining defendant's guilt or innocence.

Defendant next asserts that he was denied a fair trial because it became apparent from questions submitted by the jury that a single juror was disagreeing with the others and was being subjected to an impermissibly coercive atmosphere. We disagree. As discussed previously, this Court reviews the decisions of a trial court to grant or deny a mistrial for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Inadvertent disclosure of the jury's state of deliberation is not grounds for granting a mistrial absent a showing of some coercive impact caused by the revelation. *People v Bufkin*, 168 Mich App 615, 617; 425 NW2d 201 (1988). Claims of a coerced verdict are reviewed case by case considering all of the facts and circumstances. *People v Vettese*, 195 Mich App 235, 244; 489 NW2d 514 (1992).

Here, defendant's claim is without merit because the record does not support his argument. Defendant's attempt to establish that a specific juror was a lone dissenter is based on piecing together the circumstances of a specific juror's response to an inquiry made of the jury panel during the trial, the reaction of that same juror during polling, and questions asked by the jury during jury deliberation that implied that a single juror may have been casting a lone dissenting vote at that time. We do not believe that these circumstances sufficiently establish that this juror was a lone dissenter. And even if they did, there is absolutely no indication that any of the circumstances resulted in the juror being coerced. During deliberations, the juror's identity was never revealed in open court, nor at any point was the juror singled out for special consideration. Consequently, the facts and circumstances of this case do not support a finding of coercion, and the trial court did not abuse its discretion in denying defendant's request for a mistrial.

Finally, defendant argues that his twenty- to thirty-year sentence as an habitual offender violates the principle of proportionality announced in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). We disagree. Defendant's record includes convictions for assault and battery, larceny, attempted breaking and entering, receiving and concealing stolen property, prison escape, possession of marijuana, and obstructing a police officer. Defendant's record also reveals a lack of conscience, little regard for authority, lack of impulse control, little remorse, and a lack of motivation to change. We find that the trial judge did not abuse his discretion in fashioning defendant's sentence, and defendant's sentence was proportionate to the circumstances surrounding the offense and offender. *Id.*

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Jane E. Markey  
/s/ James C. Kingsley

<sup>1</sup> Specifically, the following exchange took place between the trial court and defendant's counsel:

Trial Court: Do you have a position on mistrial for the defense, Mr. Milton?

Defense Counsel: Your Honor, the defendant defers to the discretion of the Court in this matter.

Trial Court: The defendant does not propose (sic) – does not take a position in opposition then to a mistrial?

Defense Counsel: That is correct. The defendant defers to the discretion of the Court in the exercise of its discretion.